

**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515-1402**

March 11, 2019

The Honorable Wilbur Ross  
Secretary  
Department of Commerce  
1401 Constitution Ave., NW  
Washington, DC 20230

Dear Secretary Ross,

I am writing today to voice my continued strong concerns about the exclusion process for the Section 232 steel and aluminum tariffs and to request information on decisions recently released by the Department of Commerce ("the Department"). As always, my focus as I raise these issues is on working with you to improve this process to ensure it is fair, transparent, and efficient for U.S. companies of all sizes.

As you may know, on February 26, 2019, the Department began releasing decisions for steel exclusion requests that went through the rebuttal and surrebuttal process that was established in September 2018. No such decisions for aluminum have been released yet.

According to statistics compiled by my office, between February 26 and March 8, the Department released 1045 such decisions. Of those, 61 were approved and 984 were denied, a 5.84% rate of approval. I have long worried that there was a finger on the scale favoring objectors and, though there are still thousands more decisions for the Department to release, the early data suggests those worries were well-founded.

With that in mind, I am requesting a written response to the following questions as soon as possible but no longer than two weeks from today:

1. How is the Department evaluating an objector's overall capacity to make the steel articles in the quantity and quality specified? For instance, US Steel and Nucor thus far have prevailed respectively on 322 of 333 (96.70%) and 515 of 544 (94.67%) requests to which they objected and for which the Department released a decision.<sup>1</sup> Did the Department verify that these companies have the current capacity and capability to deliver on time the quantity and quality specified of all 322 and 515 requests respectively on which they prevailed? Or was each request evaluated on an individual basis in a vacuum without regard to the cumulative amount that was already approved for that objector?

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<sup>1</sup> See Figure 1 in Supporting Information

2. The Department's September 11 Federal Register notice<sup>2</sup> requires that objectors be able to produce the steel "immediately," which the Department defines as eight weeks. If an objector is not currently producing the steel, the objector "must identify how it will be able to start production within eight weeks." Does the Department have a plan in place to verify that the objectors have delivered the steel article or started production in the specified timeline? Is there any penalty or avenue for recourse if an objector does not meet the promised timeline to produce the article?
  - a. If the recourse is to file a new exclusion request, how does the Department justify forcing the requester, who is not at fault since it was the objector who could not deliver the article on time as promised, to start the process over, possibly have to rebut an objection from the same company that could not deliver the article on time, and wait at least 106 days<sup>3</sup> for a decision? This could push the process to well over a year for them.
3. The language of the decision memos released by the Department is quite opaque when it comes to understanding how the Department arrived at its conclusion. Is the Department planning to increase transparency and contribute to participants' understanding of the process by more overtly explaining what factors contributed to an approval or denial?
4. The Department's September 11 Federal Register notice<sup>4</sup> clarified the term "substitute product" to mean that "the steel being produced by an objector can meet 'immediately'...the quality...regulatory, or testing standards, in order for the U.S. produced steel to be used in that business activity in the United States by that end user." As mentioned earlier, the language of the decision memos does not offer clarity on the exact reason for denial, so it is difficult to know if a substitute product was found and factored into the decision. How many denials thus far were on the basis that the Department determined that a substitute product was available?
5. The Department's September 11 Federal Register notice<sup>5</sup> barred trade associations from filing objections. It also stated that "Only individuals or organizations that have a posted objection to a submitted exclusion request...may submit a surrebuttal." However, my office identified at least 53 surrebuttals that were filed by *members* of the trade associations. Six of those underlying requests have been denied thus far.<sup>6</sup>

In the first place, and most obviously, these surrebuttals were not, as the regulations require, filed by the same individual or organization that filed the objection. Different people from different organizations certified the objection form and the surrebuttal form.

Second, these surrebuttals introduce new fact patterns that are separate from the original objection of the trade association, which presumably contained aggregated data. Because the

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<sup>2</sup> <https://www.federalregister.gov/documents/2018/09/11/2018-19662/submissions-of-exclusion-requests-and-objections-to-submitted-requests-for-steel-and-aluminum>

<sup>3</sup> This is the official Department estimate of the time it takes to go through the 30-day comment period and 60-day analysis, as well as the 16 days for a rebuttal and surrebuttal process as needed. However, very few requests have been approved or denied in this timeframe.

<sup>4</sup> <https://www.federalregister.gov/documents/2018/09/11/2018-19662/submissions-of-exclusion-requests-and-objections-to-submitted-requests-for-steel-and-aluminum>

<sup>5</sup> Ibid

<sup>6</sup> See Figure 2 in Supplemental Information

surrebuttal is the final step in the process, the requester has no recourse to rebut these claims. For instance, Optimus Steel filed the six surrebuttals that thus far resulted in a denial. The surrebuttals were for objections filed by the Wire Rod Coalition. However, in the original Wire Rod Coalition objections, Optimus Steel is not specifically mentioned in the Excel objection form as being capable of making the product in question. In the objection's PDF supporting document, Optimus Steel is mentioned once and only in the context of being a member of the Coalition, not individually capable of making the product in question.

- a. How did surrebuttals filed by members of trade associations factor into the six denials? Again, because the language of the decision memos does not offer clarity on the exact reason for denial, it is difficult to know how the trade association's objection and its member's surrebuttal factored into the decision.
  - b. What is the Department's policy toward allowing trade association members to file surrebuttals on trade association objections and how does the Department justify posting these surrebuttals given the regulations that appear to prohibit this practice?
6. For how many decisions had the requester submitted confidential business information? For such decisions, how many approved and how many were denied?
  7. For how many decisions had the objector submitted confidential business information? For such decisions, how many approved and how many were denied?
  8. Before February 26, 2019, all of the denials, minus some early ones, were made on the basis that "Customs and Border Protection has advised BIS that the product description is inconsistent with the claimed classification under the Harmonized Tariff Schedule of the United States."<sup>7</sup> In other words, the requester used the wrong tariff code.

However, as the Department has released decisions for requests that went through the rebuttal and surrebuttal process, a new basis has emerged. It includes the aforementioned language, but goes further:

"Additionally, BIS has considered the evidence provided, including in the exclusion request as well as any applicable objection filings...ITA recommends finding, based on all of the evidence presented, that the product referenced in the...exclusion request is produced in the United States in a sufficient and reasonably available amount and of a satisfactory quality."<sup>8</sup>

This new basis raises a number of questions:

- a. In general, is the Department verifying that the correct HTS code is being used *before* putting requests into the rebuttal and surrebuttal process? If not, please explain why since this seems like a backward procedure given the questions that follow.
- b. It appears that with this additional language, the Department is simultaneously saying a requester used the wrong HTS code but the Department would have denied the request anyway based on the objections. Is that interpretation correct? If so, how is the Department certain it has properly evaluated the correct product if the wrong HTS code was used?

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<sup>7</sup> A representative example can be found here: <https://www.regulations.gov/document?D=BIS-2018-0006-100464>

<sup>8</sup> A representative example can be found here: <https://www.regulations.gov/document?D=BIS-2018-0006-102308>

- c. My office identified 40 requests that went through the rebuttal and surrebuttal process but were only denied for using the wrong tariff code. While it is only speculation, it appears that those requests may otherwise have been approved given that they went through the rebuttal and surrebuttal process and the decision memos did not include the additional language. Is that interpretation accurate?
    - i. If the interpretation of 8(c) is accurate, and if the interpretation of Question 8(b) is also accurate, why is the Department unable to provide parity? In other words, how is the Department able to say a company used the wrong HTS code all the while reviewing the objections and denying the request, but unable to say a company used the wrong HTS code all the while reviewing the objections and approving it, or at least giving an expedited path to approval?
    - ii. If the interpretation of 8(c) is accurate, the next step appears to be that the requester must go through the e-ruling process at Customs and Border Protection to obtain the correct HTS code. Is that correct?
    - iii. If 8(c)(ii) is correct and the requester gets an e-ruling, is there any special process by which the requester can resubmit the request to the Department and get an expedited decision? Or must the request go through the whole submission, comment period, and potential rebuttal and surrebuttal process all over again?
      - 1. If the former, is the Department planning to release any instructions publicly to assist companies in this situation?
      - 2. If the latter, why is the Department unable to provide parity? Again, how is the Department able to say a company used the wrong HTS code all the while reviewing the objections and denying the request, but unable to say a company used the wrong HTS code all the while reviewing the objections and approving it, or at least giving an expedited path to approval?
      - 3. If the latter, the 40 requests in question waited an average of 224 days from the date of submission to the date of denial.<sup>9</sup> How does the Department justify the added burden of forcing the requester to wait weeks for an e-ruling and another at least 106 days<sup>10</sup> to go through the whole process all over again? This could push the process to well over a year for them.
  - d. How is the Department planning to treat the eligibility for retroactive relief from tariffs paid for requests that were denied in the circumstances of 8(b) and 8(c)?
9. Of the 1045 decisions released between February 26 and March 8, 736 of the underlying requests contained one or more objections and no rebuttal or surrebuttal. All 736 were denied. How does the Department account for such apparent deference to the objectors? For instance, many objections did not appear to meet the Department's scenario under which an objection should prevail. The below are a small number of examples.

<sup>9</sup> See Figure 3 in Supporting Information

<sup>10</sup> See Footnote 3



- a. An objection filed by US Steel<sup>11</sup> for which they were the only objector on the request: In Question 3.a of the objection form, US Steel says it can fulfill 100% of the amount in the exclusion request, but does not answer Questions 3.b, 3.c, or 3.d, which deal with timing for manufacturing and delivery, saying it considers that information proprietary. Given the Department's requirements for the objector to demonstrate that it can "immediately" (in eight weeks) produce the article in question, did the Department contact US Steel to obtain the answers to these vital questions and ensure they could meet an eight-week production timeline? If not, since the objector did not list the amount of time it would take to manufacture and deliver the product, how did the Department determine that the objector can meet the quantity and quality requested on time?
- b. An objection filed by ArcelorMittal Tubular Products<sup>12</sup> for which they were the only objector on the request: Similar to the US Steel example above, Question 3.a of the objection form is listed at 100%, but Questions 3.b, 3.c, and 3.d are blank because the company considers that information proprietary and that lead times are "subject to steel availability." Did the Department contact ArcelorMittal to obtain the answers to these vital questions and ensure they could meet an eight-week production timeline? If not, since the objector did not list the amount of time it would take to manufacture and deliver the product, and noted that even that timeline could be subject to delays, how did the Department determine that the objector can meet the quantity and quality requested on time?
- c. An objection filed by TimkenSteel<sup>13</sup> for which they were the only objector on the request: In Question 3.c of the objection form, TimkenSteel says it can manufacture the steel product in question in 150 days, which is 21 weeks and 3 days. Again, given the Department's requirements for the objector to demonstrate that it can "immediately" (in eight weeks) produce the article in question, how did the Department determine that the article was actually available in eight weeks, despite the longer timeline cited by the objector? Additionally, if the Department did accept the objector's 21-week timeline, why did the Department not use the flexibility it has to grant an exclusion for a period of time shorter than a year?
- d. An objection filed by Nucor<sup>14</sup> for which they were the only objector on the request: Similar to the TimkenSteel example above, Nucor says it can manufacture the steel product in question in 84 days, which is 12 weeks, and that "lead times may vary," leaving the possibility it could take longer than 12 weeks. How did the Department determine that the article was actually available in eight weeks, despite the longer timeline cited by the objector? Additionally, if the Department did accept the objector's 12-week timeline, why did the Department not use the flexibility it has to grant an exclusion for a period of time shorter than a year?

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<sup>11</sup> <https://www.regulations.gov/document?D=BIS-2018-0006-11534>

<sup>12</sup> <https://www.regulations.gov/document?D=BIS-2018-0006-11459>

<sup>13</sup> <https://www.regulations.gov/document?D=BIS-2018-0006-14536>

<sup>14</sup> <https://www.regulations.gov/document?D=BIS-2018-0006-12275>

10. What has been the Department's proactive outreach to participants in the exclusion process vis-à-vis the rebuttal and surrebuttal process? My office has found that of the 392 requesters who had an objection filed on at least one of their requests, 200 filed no rebuttals. While an imperfect proxy, it appears that these 200 companies were generally smaller – they filed an average of 21 requests, while the 192 companies that filed at least one rebuttal had an average of 45 requests.

I am worried that the Department did not proactively make participants aware of the rebuttal and surrebuttal process despite having contact information for each requester and objector. I hope you can assure me and prove that such outreach did take place. The data suggests, though, that over half the eligible companies did not file rebuttals not because they chose not to, but because they simply did not find out in time. This is an important point since the Department has denied every request with no rebuttal. Many companies will lose thousands or millions of dollars on this question.

To be sure, some requesters already employed or were able to hire lawyers or lobbyists to guide them through this complex process. However, plenty of requesters that contacted my office are small operations who have hardly, if ever, interacted with the Federal Government. I am worried that these are the companies that are ultimately being left behind, and left with the impression that their government does not care about them.

My office stands, as always, ready to assist you and your Department in making sure the exclusion process is transparent, fair, efficient, and functional for all participants. However, as it currently stands, I have seen little that gives me faith that any of those four ideals are being met.

Thank you in advance for your prompt response to this inquiry.

Sincerely,



JACKIE WALORSKI  
Member of Congress

## Supporting Information

**Figure 1: Objector success rates for requests that went through the rebuttal and surrebuttal process (as of March 1, 2019)**

Objector	Total Objections Filed	Decisions with an Objection from the Company	Objector Prevailed (Request Denied)	Requester Prevailed (Request Approved)	Objector Success Rate
AK Steel	1459	103	102	1	99.03%
American Line Pipe Producers Assn	165	26	26	0	100.00%
ArcelorMittal USA	1017	54	54	0	100.00%
Bekaert Corporation	5	1	1	0	100.00%
Benteler Steel/Tube Manufacturing	173	13	13	0	100.00%
Berg Steel Pipe Corp.	111	2	1	1	50.00%
Boomerang Tube, LLC	31	1	1	0	100.00%
Bristol Metals, LLC	97	17	17	0	100.00%
Carpenter Technology Corporation	92	2	2	0	100.00%
Central Wire Inc.	11	2	2	0	100.00%
Commercial Metals Company	101	2	2	0	100.00%
Crucible Industries LLC	21	8	8	0	100.00%
Electralloy	314	9	9	0	100.00%
Evrast Inc.	31	2	2	0	100.00%
Felker Brothers Corporation	252	9	0	9	0.00%
Gerdau	122	14	14	0	100.00%
IPSCO Tubulars, Inc.	299	39	39	0	100.00%
Maverick Tube Corporation	81	2	2	0	100.00%
New Castle Stainless Plate, LLC	126	102	102	0	100.00%
North American Stainless	78	4	4	0	100.00%
Nucor	3672	544	515	29	94.67%
Phoenix Tube Co. Inc.	19	17	17	0	100.00%
Pilgrim Metal Products LLC	1	1	1	0	100.00%
Plymouth Tube Co.	62	14	10	4	71.43%
Primus Pipe & Tube, Inc.	101	5	0	5	0.00%
Republic Steel	741	70	49	21	70.00%
Sandvik Materials Technology	503	22	18	4	81.82%
Steel Dynamics, Inc.	773	48	48	0	100.00%
Steel Ventures	195	194	194	0	100.00%
Tenaris Bay City, Inc.	274	12	12	0	100.00%
Thomas Steel	1	1	1	0	100.00%
TimkenSteel Corporation	1893	61	59	2	96.72%
Tree Island Wire USA Inc.	4	2	2	0	100.00%
US Steel	3685	333	322	11	96.70%
US Steel-POSCO	57	8	8	0	100.00%
Valbruna Slater Stainless Inc.	8	8	8	0	100.00%
WCJ Pilgrim Wire, LLC	3	1	1	0	100.00%
Webco Industries, Inc.	1162	22	17	5	77.27%
Wire Rod Coalition	722	29	20	9	68.97%
Zekelman Industries, Inc.	398	241	241	0	100.00%

**Figure 2: Denials where surrebuttals were filed by trade association members (as of March 1, 2019)**

Request ID	Requester	Objections Filed	Rebuttals Filed	Surrebuttals Filed	Trade Association Objection ID	Trade Association	Trade Association Member Surrebuttal	Trade Association Member
28766	MNP Corporation	3	3	3	44380	Wire Rod Coalition	68856	Optimus Steel
28809	MNP Corporation	2	2	2	43356	Wire Rod Coalition	69213	Optimus Steel
28861	MNP Corporation	2	2	2	43876	Wire Rod Coalition	69229	Optimus Steel
28892	MNP Corporation	3	3	3	43971	Wire Rod Coalition	69238	Optimus Steel
28944	MNP Corporation	3	3	3	44141	Wire Rod Coalition	69518	Optimus Steel
28947	MNP Corporation	3	3	3	44161	Wire Rod Coalition	69528	Optimus Steel



**Figure 3: Wait times for requests that went through the rebuttal and surrebuttal process and were denied only because of the wrong HTS code (as of March 1, 2019)**

<b>Request ID</b>	<b>Company</b>	<b>Wait Time from Date Submitted to Decision</b>
26602	American Piping Products, Inc.	232
25976	Hercules Drawn Steel Corporation	225
25977	Hercules Drawn Steel Corporation	225
25978	Hercules Drawn Steel Corporation	225
25981	Hercules Drawn Steel Corporation	225
25984	Hercules Drawn Steel Corporation	225
25985	Hercules Drawn Steel Corporation	225
25987	Hercules Drawn Steel Corporation	225
25988	Hercules Drawn Steel Corporation	225
25992	Hercules Drawn Steel Corporation	225
25998	Hercules Drawn Steel Corporation	225
25999	Hercules Drawn Steel Corporation	225
26000	Hercules Drawn Steel Corporation	225
26001	Hercules Drawn Steel Corporation	225
26003	Hercules Drawn Steel Corporation	225
26004	Hercules Drawn Steel Corporation	225
26005	Hercules Drawn Steel Corporation	225
26006	Hercules Drawn Steel Corporation	225
26504	Hercules Drawn Steel Corporation	228
26509	Hercules Drawn Steel Corporation	228
26581	Hercules Drawn Steel Corporation	228
28749	MNP Corporation	217
28759	MNP Corporation	217
28766	MNP Corporation	217
28835	MNP Corporation	217
28873	MNP Corporation	217
28896	MNP Corporation	217
28742	MNP Corporation	217
28755	MNP Corporation	217
14463	SPX Transformer Solutions, Inc.	287
14525	SPX Transformer Solutions, Inc.	287
30940	Stanley Black & Decker	212
30973	Stanley Black & Decker	212
30976	Stanley Black & Decker	212
30982	Stanley Black & Decker	212
30987	Stanley Black & Decker	212
30993	Stanley Black & Decker	212
31001	Stanley Black & Decker	212
31007	Stanley Black & Decker	212
33371	Stanley Black & Decker	217